

**EFFECTIVE**

OCTOBER 1, 2006 NUNC PRO TUNC  
NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS

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**FILED**

OCTOBER 12, 2006

**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY  
DEPT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF THE SUSPENSION:  
OR REVOCATION OF LICENSE OF  
HILARY B. KERN, M.D.  
LICENSE NO. 25MA06770800  
TO PRACTICE MEDICINE AND SURGERY  
IN THE STATE OF NEW JERSEY :

ADMINISTRATIVE ACTION

FINAL ORDER

This matter was presented to the State Board of Medical Examiners by the Attorney General of New Jersey, by Joan D. Gelber, Deputy Attorney General, by way of inquiry into the professional practice of Hilary B. Kern, M.D. Dr. Kern is board-certified by the American Board of Physical Medicine and Rehabilitation and by the American Academy of Electrodiagnostic Medicine. She is represented by E. Vicki Arians, Esq.

Dr. Kern appeared, on notice and with counsel. before a Board Committee on August 23, 2006, following Board receipt of some sixteen subpoenaed exemplar patient records and billings for electrodiagnostic testing (EDX) including nerve conduction studies (NCS) and electromyography (EMG), prepared during the period 2003 - 2006. The Committee reviewed with Dr. Kern exemplar concerns in her charts of examination, treatment and billing.

Dr. Kern presented a curriculum vitae which she acknowledged contained various errors and which failed to disclose her New Jersey licensure or any of her New Jersey offices. In fact, she has acknowledged practicing at various locations in New Jersey since 2001, including "Unimed, P.C./Allied Health Management, LLC,, 443 60<sup>th</sup> St., also at 877 Broad St., Suite 203, Newark and

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15 William Street, Newark, and currently at 1865 Morris Avenue, Union, N.J.<sup>1</sup> She also maintains an office at 30 East 40<sup>th</sup> St., Suite #1200, New York, NY 10016. On Attending Physician Reports requiring a professional address and sent to insurance carriers, she has listed 600 Harbor Blvd., “Suite” 823, Weehawken, NJ 07086-6747, which is not, in fact, an office. She has practiced under several entity names, including but not necessarily limited to, “Allied Health Management, LLC” and “Allstate Medical Group, P.C.” as well as under the name “Hilary B. Kern, M.D.” She has not provided certain information mandated by the New Jersey Health Care Consumer Information Act, N.J.S.A. 4:9-22.21 et seq., for inclusion on the Board of Medical Examiners’ Physician Profile website.

Respondent informed the Committee that she commenced her New Jersey affiliations after responding to a newspaper advertisement, and was engaged by a business entrepreneur, Mr. Alex Braylovsky, to work in offices including a Newark office described as owned by Ronald L. Collins, M.D.<sup>2</sup> However, Dr. Kern was not interviewed by Dr. Collins and never met him. With Dr. Kern’s approval, the entrepreneur-business manager of the office visited the offices of chiropractors treating persons who had been involved in motor vehicle accidents, “marketing” a pain management practice seeking referrals to Dr. Kern for electrodiagnostic testing.

Respondent has represented that she attended the New Jersey offices once per week, and saw all patients referred to her. The charts contain “referral forms”, with certain essential history parts pre-printed. Each patient came for one visit, at which Dr. Kern stated that she examined the patient, who was then scheduled for a second visit at which electrodiagnostic testing was performed, sometimes at more than one session. The patient chart does not include documentation of any physical examination or interim history prior to the testing on the second visit.

Dr. Kern stated that in the prior offices, she requested Mr. Braylovsky to administer nerve

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<sup>1</sup>Dr. Kern made handwritten corrections to her curriculum vitae to include an office address of “1856” Morris Ave. [*sic*], Union. She continued to omit reference to 8 Krotik Place, Irvington, NJ, although medical reports signed by her list that address. She acknowledged that she has not been licensed in Georgia since 1996.

<sup>2</sup>Administrative Complaint was filed against Dr. Collins on May 22, 2006, and resolved by a Final Order.

conduction studies (NCS) utilizing a “standard battery” of testing which she devised, subject to occasional individual variations. At Dr. Kern’s Union office, opened in 2005, the tests were still administered by Mr. Braylovsky or by technicians supplied for the purpose by a business company, “F-M Testing, Inc.”, typically NCSs bilaterally and often on both upper and lower extremities. Dr. Kern then administered a “standard battery” of muscle testing. No formal consultation report was prepared for issuance to the referring practitioner. Nevertheless, the initial visit and the testing were billed as “consultation” services, billed in Dr. Kern’s name to the insurance carriers of the patients, claiming a consultation under CPT 99244.

The Manual of Current Procedural Terminology©, published by the American Medical Association, provides the uniformly recognized definition for CPT 99244. A “consultation” is a type of service provided by a physician whose opinion or advice regarding evaluation and/or management of a specific problem is requested by another physician or other appropriate source. The request for a consultation from the attending physician and the need for consultation must be documented in the patient’s medical record. Also, the consultant’s opinion and any services ordered or performed must be documented in the patient’s record and must be communicated to the requesting physician. CPT 99244 requires documentation of three key components: a comprehensive history; a comprehensive examination; and medical decision making of moderate complexity, typically requiring 60 minutes face-to-face with the patient/and/or family. Dr. Kern’s initial visit notes do not contain all of the above elements; and her reports are not addressed to the referring physician.

With regard to the NCS testing, Dr. Kern stated that she relied upon the numerical data presented to her by the technician, purporting to be from the “standard battery” of NCS studies and usually of upper or lower extremities bilaterally and often of both upper and lower extremities, and she seldom reviewed the waveforms. None of the technicians were identified on the patient record. Dr. Kern stated that she then administered her “standard battery” of electromyography studies (EMG). Patients were often given EMG studies bilaterally, also on both upper and lower extremities. Dr. Kern then signed a testing report. The bills were submitted in Dr. Kern’s name to the insurance carriers of the patients, claiming NCS and EMG services coded under certain CPT numbers, regularly including CPT 95861.

The CPT Manual defines the criteria for billing CPT 95861 and for other EMG tests. Respondent acknowledged that in the cases reviewed, muscles not pertinent to the patient complaint were tested and/or others which should have been tested were not, and fewer than the five limb muscles plus paraspinals ( required for CPT 95861) were tested, thus individually and in combination rendering her diagnoses unreliable.

Respondent is aware that the Attorney General was prepared to file an Administrative Complaint alleging, in summary, that respondent “marketed” to chiropractors who were treating persons involved in motor vehicle accidents. Respondent sought and accepted patients for electrodiagnostic testing without requiring of the referring doctors the kind of advance information required by N.J.A.C. 13:35-2.6(l) to assure that the referral was appropriate. In addition, the Complaint would have alleged that respondent regularly documented inadequate clinical examinations, in violation of N.J.A.C. 13:35-2.6. Further, that her charts failed to document patient reports of specifically radicular complaints or findings of neurological deficit to justify an electrodiagnostic testing. It would also have been alleged that respondent nevertheless usually recommended electrodiagnostic studies (EDX), typically bilateral and often of both upper and lower extremities, in violation of N.J.S.A. 45:1-21(b), (c) and/or (d), (e) and (h) and of accepted standards of practice. It would have been alleged that respondent submitted bills to third party payors containing CPT codes for consultations, which did not comply with the requirements applicable to those codes, and that she recommended electrodiagnostic testing not justified by the chart documentation.

In addition, the Complaint would have alleged that respondent failed to tailor her EDX studies to an initial and evolving differential diagnosis of each patient, and instead allowed her unlicensed technicians to perform a standard battery of NCSs, and/or sometimes to test nerves having no pertinent relationship to the problem under study, in violation of N.J.A.C. 13:35-2.6(n)3. Also, that the technicians were not identified, and respondent did not comply with other requirements of N.J.A.C. 13:35-2.6(k). Further, that many of the studies in the exemplar charts were incompetently performed, based on unreliable waveforms and misplaced cursors and demonstrating artifact and other poor technique, thus resulting in unreliable numerical data , and thereby generating

irrelevant numbers which Dr. Kern then purported to interpret, in violation of N.J.A.C. 13:35-2.6(c)1. Further, that the information sometimes indicated the possibility of conduction block, a potentially serious condition which Dr. Kern did not address even on the one occasion it was identified. In addition, review of many of the left side-right side waveforms raised question about the integrity of the tests.

The Complaint would further have alleged that after the NCSs, respondent performed a standard battery of virtually the same EMGs irrespective of the patient's individual circumstances and the results of the NCS studies. In addition, the Attorney General would have alleged that respondent's EMG studies regularly failed to test the number and assortment of limb muscles essential to a reliable diagnosis and required for the CPT codes under which she billed, all in violation of N.J.A.C. 13:35-2.6(p)5(iii) and of accepted standards of practice. Further, that some reports claimed diagnoses of bilateral radiculopathy of particular nerve roots despite having failed to test the muscles which would have confirmed or refuted those diagnoses. It would further have been alleged that respondent prepared interpretations claiming abnormalities, which were not supported by the data and which placed the patients at risk for unnecessary medical or surgical interventions. Also, that her reports, despite regularly claiming to have identified pathology, did not make recommendations for treatment or follow-up by a plenary licensed physician, nor did she provide follow-up. Further, it would further have been alleged that the electrodiagnostic testing was regularly billed in a manner which constituted unbundling and/or which was significantly inflated in light of the tests performed, thereby charging excessive fees, in violation of N.J.A.C. 13:35-6.11.

The Attorney General would also have alleged respondent's repeated failure to have provided the information required by The New Jersey Health Care Consumer Information Act, N.J.S.A. 4:9-22.21<sup>3</sup> et seq., despite numerous requests and reminders by the New Jersey Division of Consumer Affairs, thus not disclosing her various New Jersey practice locations.

The abovesaid conduct, singly or cumulatively, would have been alleged to constitute, variously, violations of rules including N.J.A.C. 13:35-2.6(a), (b), (c), (e), (f), (k), (m), (n), (o), (p); of N.J.A.C. 13:35-6.5 and -6.11 and -6.19; and of statutes N.J.S.A. 45:1-21(b), (c), (d), (e) and (h) and

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<sup>3</sup>P.L. 2003, c.96, eff. June 2, 2004, as amended effective. August 7, 2004.

of N.J.S.A. 45:9-22.23.

Having considered the matter, Dr. Kern has represented that, following her August meeting with the Board's investigative committee, she promptly undertook to arrange for pertinent continuing medical education, closed her New Jersey office, and terminated her association with Alex Braylovsky. Dr. Kern, having had the opportunity to consult with her attorney, and being desirous to resolve this matter without recourse to further proceedings, hereby acknowledges that the Attorney General has substantial evidence sufficient to prove the allegations described above. Respondent has agreed to certain settlement terms which the Board finds to be in the public interest as an adequate resolution of this matter. Therefore, for good cause shown,

IT IS, ON THIS *11<sup>th</sup>* DAY OF *October* 2006

ORDERED:

1. Respondent's license to practice medicine and surgery in the State of New Jersey shall be suspended for two years. Contingent specifically upon her compliance with the following conditions<sup>4</sup>, the first year shall be an active suspension commencing retroactively as of October 1, 2006, and the remaining year shall be stayed as a period of probation;

2. Respondent shall surrender her State Controlled Drug Registration for the duration of the active suspension period, and shall make prompt arrangements with the Division of Consumer Affairs Controlled Dangerous Substance Registration Program for the lawful disposal of all Controlled Drugs in her possession or under her control in the State of New Jersey, and shall arrange for the lawful disposal of all non-CDS medications in her possession or under her control within this State.<sup>5</sup>

3. Respondent shall assure that all New Jersey office letterhead and all prescriptions pads bearing her name are destroyed. She shall make safe and appropriate disposition of all medical

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<sup>4</sup>The Board relies upon respondent's representation that she has permanently terminated any business relationship with Alex Braylovsky and with "F-M Testing."

<sup>5</sup>Dr. Kern made handwritten corrections to her curriculum vitae to include an office address of "1856" Morris Ave. [*sic*], Union. She continued to omit reference to 8 Krotik Place, Irvington, NJ, although medical reports signed by her list that address. She acknowledged that she has not been licensed in Georgia since 1996.

equipment in her possession or under her control within this State.

4. Respondent shall assure that all patient records are preserved in a secure manner for seven years from date of last entry, and shall notify patients of their availability as required by N.J.A.C. 13:35-6.5.

5. Respondent shall reimburse investigative costs and fees to the Board of Medical Examiners totaling \$14,096.00, pursuant to N.J.S.A. 45:1-25(d) no later than 20 days after the filing of the Order.

6. Pursuant to N.J.S.A. 45:1-22, respondent shall reimburse insurance carriers for charges for the twelve exemplar patients previously paid to her (currently, \$12,576.75) by November 1, 2006 and shall waive collection of any additional moneys for those patients or the remaining patients, as shown on Attachment A hereto.<sup>6</sup>

7. Respondent is assessed an aggregate civil penalty of \$5,000.00 for the quality of care offenses and the billing offenses, pursuant to N.J.S.A. 45:1-25.

8. Respondent shall be permitted to pay the penalty in equal monthly installments of \$1,000.00, with the first payment due on December 1, 2006 and each subsequent payment due on the first day of each month thereafter, at the Board office at P.O. Box 183, Trenton, NJ 08625-0183.

9. Interest on all financial assessments shall accrue in accordance with Rule of Court 4:42-11. All payments shall be made by certified check or money order payable to the State of New Jersey. In the event that a monthly payment is not received within ten days of its due date, the entire balance of the civil penalty and costs shall become due and owing. For any payments ordered in paragraphs 5, 6 and 7 above, which have not been paid in full within 10 days of the entry of this Order, a Certificate of Debt shall be filed pursuant to N.J.S.A. 45:1-24.

10. Prior to the end of the active suspension period, and before resuming any form of medical practice in New Jersey on probation, respondent shall appear before a Board Committee to discuss her status and shall submit in advance to the Board proof of the following:

(a) Respondent shall have taken and received an unconditional passing grade in Board-approved courses in medical record keeping.

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<sup>6</sup>Attachment A is redacted to protect patient confidentiality. A complete identification has been provided to respondent and is filed with the Board of Medical Examiners.

(b) Respondent shall have taken and satisfactorily completed a course in professional ethics approved in advance by the Board, receiving an “unconditional pass” grade. A list of some approved courses is available from the Board office.

(c) (i) Respondent shall have taken and satisfactorily completed a rigorous preceptorship in the basic and clinical sciences as well as practical skills and application of electrodiagnostic testing and physiatry. The preceptor(s) must be preapproved by the Board and shall be a physiatrist or neurologist certified by the American Board of Physical Medicine and Rehabilitation or the American Board of Psychiatry and Neurology who is also a diplomat of the American Board of Electrodiagnostic Medicine. Respondent shall submit to the Board’s Director of Medical Education the curriculum vitae, proposed preceptorship structure and curriculum for review and approval of the Board. The curriculum shall include self study and preceptor review of the AANEM (American Association of Neuromuscular and Electrodiagnostic Medicine) Training Program Self Assessment Examination materials. Additional CME, case reports, podcast and other study materials shall be utilized as needed to remediate deficiencies in medical knowledge as determined by the preceptor. Approval of the preceptor/monitor and the remedial program is at the sole discretion of the Board, and shall not be unreasonably withheld.

(ii) In the field of physiatry, the curriculum shall include study of preceptor-approved materials, case review and experiences that address the PASSOR Musculoskeletal Physical Examination Competencies Lists. Respondent shall purchase the current version of the American Academy of Physical Medicine and Rehabilitation Coding Manual and shall study correct coding and appropriate billing for the field with the preceptor. The preceptor shall supervise respondent’s practice and billing which shall include monthly review of at least 10 charts from Respondent’s practice to include randomly selected charts, examination and testing records, coding and billing records and charts selected for review associated with current topics under study.

(iii) The preceptor shall provide the Director of Medical Education with quarterly reports detailing compliance and progress in remediation. Additionally the preceptor shall report to the Director of Medical Education at such time as respondent has demonstrated adequate academic knowledge and basic clinical skill in the field to determine the need for electrodiagnostic testing prior to respondent recommencing electrodiagnostic testing at any location. The preceptor shall



promptly report to the Director of Medical Education any failure on the part of respondent to comply with the preceptorship or any inability to integrate the educational material into sound medical judgement and practice and shall also promptly report any deviations from an appropriate standard of care or correct coding and billing in her practice.

(iv) The preceptor may, in his/her sole discretion, require a personal examination and/or testing of a specific patient and, if so, respondent shall not provide further treatment until the preceptor has completed that service.

(d) With respect to all of the above components of the preceptorship, respondent shall assure that the preceptor submits a monthly report for each of the months of the active suspension and, upon receipt of favorable reports from the preceptor, from the Board's Director of Medical Education and at the Board's reasonable discretion, at a lesser frequency during the probation period.<sup>7</sup>

(e) All services performed by the preceptor shall be at respondent's cost, which shall not be passed on to the patient/third party payor.

11. Respondent shall cooperate with the Board-approved preceptor/monitor and shall assure that the preceptor/monitor submits the required reports timely to the Board. Respondent shall authorize the preceptor/monitor to make immediate report to the Board regarding work (whether documented or not documented by respondent) which, in the opinion of the preceptor, fails to meet accepted standards of practice and also of any individual matter which is believed to present an imminent peril to the patient or to the public health, safety or welfare.

12. Respondent shall provide appropriate releases to any and all persons who are participating in the evaluation and/or supervision program as outlined herein, as may be required. Respondent shall make such arrangements with her employer(s), if any, as are necessary in order that all reports, records and other pertinent information (whether or not such patient records are otherwise the property of respondent's employer) shall be provided in a timely manner to the Board, which shall preserve patient confidentiality. Respondent agrees that none of the persons proposed and/or approved as remedial course evaluator, or preceptor/monitor shall have or incur any liability to respondent as a result of their good faith performances of their services.

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<sup>7</sup>The charts shall be identified by patient initials, and shall be kept confidential by the Board.

13. In addition to the chart review by the preceptor, respondent shall submit monthly to the Medical Board's Director of Medical Education, on the first day of the month commencing January 1, 2007, one current patient chart with billing, other than a chart reviewed by the preceptor. The Medical Director shall select the record sampling from a true and complete copy of respondent's appointment book/calendar.

14. Prior to the start of the probation period, respondent shall have undertaken and satisfactorily completed a rigorous program of review courses in psychiatry/neurology, whose content and extent were approved in advance by the Director of Medical Education Director of the Board of Medical Examiners. The Director shall make any additional remedial recommendations deemed necessary for safe and competent practice until completion of the probation period. Respondent agrees to comply with any such recommendations.

15. Prior to commencement of the probation period, respondent shall deliver the abovesaid proofs of pre-probation requirements and shall request appointment to meet with a Board Committee to discuss her status. Upon review of said proofs and the abovesaid representations of adequate safety and competence from the preceptor and the medical course programs, and completion of the Committee interview, the Board shall reinstate respondent's license to practice, subject to such limitations as to type and location of practice, review, preceptorship/monitoring requirements as it may reasonably determine based upon recommendations of the evaluation programs and the other terms of this Order.

16. Respondent has been made aware that information regarding this matter has been referred to the Division of Criminal Justice. The entry of this Order shall not limit the authority of the Attorney General or of any other person or agency to initiate any further action permitted by law, whether administrative, civil or criminal, in any court or other forum of competent jurisdiction in connection with any matters coming within that jurisdiction.

17. It is intended by the parties that this Order shall resolve all administrative and license issues with respondent, which were specifically referenced in this document by the Attorney General with regard to her responsibility to the State Board of Medical Examiners, all and solely in connection with Professional Board statutes and regulations.

18. The Disciplinary Directives and Attachment A are incorporated in this document.

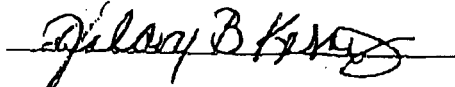
THIS ORDER IS EFFECTIVE AS OF OCTOBER 1, 2006, *nunc pro tunc*.

STATE BOARD OF MEDICAL EXAMINERS

By: Sindy Paul, MD  
Sindy Paul, M.D., President

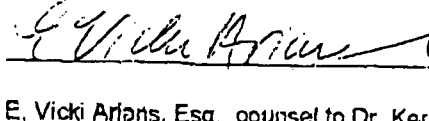
I have read and I understand the above

Order and I agree to abide by its terms.



Hilary B. Kern, M.D.

Witnessed:

 (certified as a faxed signature of Dr. Hilary Kern)

E. Vicki Arians, Esq., counsel to Dr. Kern

ATTACHMENT A

Patient Dates of Service Total fee charged Carrier Payment

Al B 1/15/03, 2/5/04 EDX \$4,105.60 Allstate \$2,133.45

D B 3/30/03, 4/6/05 EDX, 4/13/05 \$2,725.86 Allstate  
\$1,071.29

M C 12/28/05, 1/4/06 EDX \$2,267.82 Liberty Mutual  
Ins. Unpaid

J F 4/18/05, 4/25/05 EDX \$2,284.82 Allstate Unpaid

M G 12/28/05, 1/4/06 EDX \$2,267.82 Mercury  
Insurance \$2,267.82

D F 12/21/05, 1/11/06 EDX \$1,235.98 PLIGA \$ 558.51

F K 8/24/05, 9/14/05 EDX \$2,267.72 Allstate Unpaid

R L-J 1/10/05, 1/17/05 EDX \$1,518.86 Allstate \$1,197.08

N P 4/25/05, 10/5/05 10/17/05 EDX \$2,471.92 Allstate, \$1,110.66

L S 12/18/05, 1/4/06 EDX \$2,267.82 Mercury  
Insurance \$2,267.82

E V 3/30/05, 4/6/05 EDX \$1,518.86 Allstate Unpaid

N W 12/21/05, 1/4/06 EDX \$2,267.82 Liberty Mutual  
Ins. \$1,870.12

Total \$12,576.75

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## ATTACHMENT A

Patient	Dates of Service	Total fee charged	Carrier
Payment			
A <sup>8</sup> B <sup>8</sup>	1/15/03, 2/5/04 EDX	\$4,105.60	Allstate
\$2,133.45			
D <sup>8</sup> B <sup>8</sup>	3/30/05, 4/6/05 EDX, 4/13/05	\$2,725.86	Allstate
\$1,071.29			
M <sup>8</sup> C <sup>8</sup>	12/28/05, 1/4/06 EDX	\$2,267.82	Liberty Mutual Ins.
Unpaid			
J <sup>8</sup> F <sup>8</sup>	4/18/05, 4/25/05 EDX	\$2,284.82	Allstate
Unpaid			
M <sup>8</sup> G <sup>8</sup>	12/28/05, 1/4/06 EDX	\$2,267.82	Mercury Insurance
\$2,267.82			
D <sup>8</sup> F <sup>8</sup>	12/21/05, 1/11/06 EDX	\$1,235.96	PLIGA <sup>9</sup>
\$658.51			\$
F <sup>8</sup> K <sup>8</sup>	8/24/05, 9/14/05 EDX	\$2,267.72	Allstate
Unpaid			
R <sup>8</sup> L <sup>8</sup> J <sup>8</sup>	1/10/05, 1/17/05 EDX	\$1,518.86	Allstate
		\$1,197.08	
N <sup>8</sup> P <sup>8</sup>	4/25/05, 10/5/05 10/17/05 EDX	\$2,471.92	Allstate.
\$1,110.66			
L <sup>8</sup> S <sup>8</sup>	12/18/05, 1/4/06 EDX	\$2,267.82	Mercury Insurance
\$2,267.82			
E <sup>8</sup> V <sup>8</sup>	3/30/05, 4/6/05 EDX	\$1,518.86	Allstate
Unpaid			
N <sup>8</sup> W <sup>8</sup>	12/21/05, 1/4/06 EDX	\$2,267.82	Liberty Mutual Ins.
\$1,870.12			
		Total	\$12,576.75

<sup>8</sup>Patient names are redacted to preserve confidentiality. Full identification has been provided to respondent and is on confidential file with the Board of Medical Examiners.

<sup>9</sup>New Jersey Property Liability Insurance Guarantee Assn